

No. 92648

In The Supreme Court of Missouri

STATE OF MISSOURI,

RESPONDENT,

VS.

JOSEPH N. HOLMES,

APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF CHRISTIAN COUNTY, MISSOURI,
ASSOCIATE DIVISION

THE HONORABLE JOHN S. WATERS, JUDGE

CASE NO. 11CT-CR01267

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Defendant did properly preserve his argument that section 568.040, RSMo (2011) is unconstitutional because he raised it at the first opportunity, in that the State could have put on evidence of the defendant's ability to pay in its case in chief, but failed to do so, thereby relying on the burden-shifting provision of the statute to seek a conviction and, therefore, the unconstitutionality of the statute was not ripe for argument until the State rested its case.

The defendant first raised the unconstitutionality of section 568.040, RSMo (2011) in his Motion for Judgment of Acquittal at the close of the State's case. This is the first time it made any sense to make this argument. Notwithstanding the language of the statute, nothing precludes the State from accepting the burden of proving each and every element of the crime beyond a reasonable doubt -- including defendant's ability to pay. The State acknowledges this in its brief. Here, however, the State rested without putting on any evidence that Mr. Holmes had the ability to pay the DFS-ordered child support in the months charged. Instead, the State relied upon the statute placing the burden on the defendant to prove his innocence. This is precisely when the constitutionality of section 568.040, RSMo (2011) became an issue.

The State cites *State v. Wickizer*, 583 S.W.2d 519 (Mo. Banc 1979), in support of its waiver argument. The case is not helpful to the State's position. The *Wickizer* court placed emphasis on the fact that the constitutionality of the statute in question was raised for the first time on appeal. "More importantly, in appellant's Motion for New Trial,

there is no contention that the sodomy statute was unconstitutional.” 583 S.W.2d at 523. In the instant case, the constitutionality of section 568.040 was raised at the close of the State’s case in defendant’s Motion for Judgment of Acquittal, in defendant’s Motion for New Trial, in Appellant’s notice of appeal and in Appellant’s initial brief. The issue is not a surprise to the State.

As far as the State trying to carry its burden on the question of defendant’s ability to pay child support, the closest the State came to adducing any information regarding Mr. Holmes’ financial condition came when his wife testified that he/they owned some rental property. Tr. 11-12. That was it. No bank records, tax records, employment records, pay stubs or financial information of any kind was introduced into evidence by the State. It is very clear that the State relied upon the burden-shifting provision of section 568.040 in order to convict Mr. Holmes. The constitutionality of the statute is squarely at issue here.

II. The United States Supreme Court has held a statute indistinguishable from 568.040 to be in violation of the “due process clause” of the Fourteenth Amendment to the United States Constitution.

Little needs to be said about the State’s interpretation of *Hicks v. Feiock*, 485 U.S. 624 (1988). The State seems to argue that *Hicks* is inapposite because it relates to a civil contempt statute. Certainly the Court discussed the difference between civil and criminal contempt in *Hicks*, but concluded that the California non-support statute in question was criminal in nature and found the burden-shifting provision to be unconstitutional.

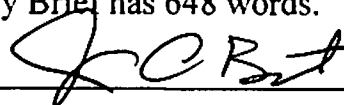
Despite the State's frail attempt to distinguish *Hicks*, the fact of the matter is that the high court's decision is four-square on point with the instant case. The California statute was held unconstitutional -- section 568.040 can fair no better.

III. Conclusion.

Appellant did not waive his argument that section 568.040 is unconstitutional. The argument was presented at the first opportunity when it became apparent that the State was relying upon the burden-shifting provision to obtain a conviction. *Hick v. Feiock* presented an identical question. This Court should strike down section 568.040 in that it violates the due process clause of the Fourteen Amendment to the United States Constitution.

Certification of Compliance,

I hereby certify that the Appellant's Reply Brief has 648 words.



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